1998

Interwest Construction, a Utah corporation v. R. Roy Palmer and Val W. Palmer, d.b.a. A.H. Palmer & Sons : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

INTERWEST CONSTRUCTION, a Utah corporation, Plaintiff and Appellant, v. R. ROY PALMER and VAL W. PALMER, d.b.a. A.H. PALMER & SONS, Defendants and Appellees.	Case No. 980276-CA Priority: 15
R. ROY PALMER and VAL W. PALMER, d.b.a. A.H. PALMER & SONS, Third Party Plaintiffs, v. JOHN RYSGAARD, d.b.a. FIBERGLASS STRUCTURES COMPANY, Third Party Defendants.	
FIBERGLASS STRUCTURES AND TANK COMPANY, Third Party Plaintiffs, v. THIOKOL CORPORATION, Third Party Defendant.	

BRIEF OF APPELLEES
(ORAL ARGUMENT REQUESTED)

APPEAL FROM A JUDGMENT IN THE
FIRST DISTRICT COURT OF CACHE COUNTY
THE HONORABLE GORDON J. LOW, DISTRICT JUDGE

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BRIEF OF APPELLEES

(In response to the Brief of Appellant Interwest Construction Co)

Defendants and Appellees, R. Roy Palmer and Val W. Palmer, d.b.a. A.H. Palmer & Sons (hereafter "Palmers") respectfully submit the following brief in response to the appeal filed by Interwest Construction Company (hereafter "Interwest"):

PRIOR OR RELATED APPEALS

Interwest Construction v. Palmer, et al., 886 P.2d 92 (Utah App. 1994); Interwest Construction v. Palmer, et al., 923 P.2d 1350, 1358-59 (Utah 1996).

JURISDICTION OF APPELLATE COURT

This Court has jurisdiction over this appeal pursuant to §§ 78-2-3(3)j and 78-2a-3(2)j, Utah Code Ann. 1953, as amended.

STATEMENT OF ISSUES RAISED ON APPEAL

1. Where a contractor [Interwest] sues its subcontractor [Palmers] in contract, claiming indemnity for 1) alleged breach of contract, 2) defects in construction, and 3) consequent attorneys fees under the contract, but trial and appellate courts find no breaches or defects, may the trial court award attorney's fees to the prevailing subcontractor [Palmers]?

2. Where a contract provides that the contractor [Interwest] may not withhold payment to the subcontractor [Palmers] after the construction project has been accepted by the owner, but the contractor [Interwest] withholds payment notwithstanding, claiming breach of contract and defects in construction, may the subcontractor [Palmers] recover its attorneys fees incurred in proving lack of breach or defects, where the contract provides for attorneys fees?

3. Where a contract provides that the contractor [Interwest] may not withhold payment to a subcontractor [Palmers] after the construction project has been accepted by the owner, is

the withholding of payments to the subcontractor [Palmers] after acceptance, a breach for which the subcontractor [Palmers] may recover attorneys fees?

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Code Ann. § 78-22-56.5 which provides for reciprocal rights to recover attorney's fees in contracts where only unilateral rights exist.

STATEMENT OF THE CASE

A. Nature of the Case

Interwest brought a suit claiming indemnity. Appendix A.

Interwest, a contractor, entered into a contract with Thiokol Chemical Corporation (hereafter "Thiokol"), owner, to construct a waste water treatment facility. Interwest entered into a subcontract with Palmers for the mechanical portion of the contract. Palmers entered into a subcontract with Fiberglass Structures (hereafter "Fiberglass") to build three wastewater tanks. Appendix D. One of the tanks failed two months after completion and acceptance of the contract by Thiokol. The failure was the result of modifications by Thiokol not breach by Palmers. At the time of acceptance by Thiokol, Thiokol owed Interwest $200,000, and Interwest owed Palmers $93,000.

Instead of Interwest suing Thiokol for the balance due under its contract with them, Interwest sued Palmers for indemnity under the subcontract alleging breach of contract and defects in construction. Palmers joined Fiberglass for possible indemnity and negligence. Fiberglass joined Thiokol as a party.

Thereafter, Interwest amended its complaint to add a cause of action against Thiokol for payment of the balance due on the contract.

The court found no breach by Palmers or Fiberglass, which finding was affirmed by the Court of Appeals and the Utah Supreme Court.

B. Course of Proceedings

The case was tried before the Honorable Gordon J. Low without a jury, and has been up on appeal twice.

C. Disposition at Trial Court

The trial court found that Thiokol's significant modifications to the tanks after Thiokol accepted them, caused the failure, and not any breach of any duties by Palmers or Fiberglass. The court granted judgment for Interwest against Thiokol for $200,000 and Palmers against Interwest for $93,000 plus attorney's fees.

D. Disposition in Appellate Courts

Thiokol appealed this matter to the Court of Appeals. The decision of the Court of Appeals upheld the lower court's finding of no breach and no defects attributable to Palmers. See a copy of the decision attached hereto as Appendix "B."

Thiokol thereafter filed a petition for Certiorari which was granted by the Supreme Court of Utah. The decision of the Supreme Court affirmed the decision of the Trial Court and modified the decision of the Court of Appeals, but still affirmed

the lack of breach or defects attributable to Palmers and Fiberglass. A copy of that decision is attached as Appendix "C."

The Trial Court's findings were not successfully challenged by any party during the various appeals.

RELEVANT FACTS

In the fall of 1988, Interwest entered into an agreement with Thiokol in which Interwest agreed to construct a waste water treatment facility for Thiokol. Finding Fact No. 5. No formal agreement was signed. The parties commenced work upon a Notice to Proceed and Plans & Specifications.

On the 1st day of December, 1988, Interwest, using its pre-printed forms, entered into a subcontract with Palmers for the mechanical portion of the construction, per plans and specifications, which included the construction of three (3) fiberglass waste water storage tanks. (Exhibit No. 37) Addendum "D." Finding No. 6.

The subcontract between Palmers and Interwest says in part:

> (1) Payments. Final payments shall be due when the work described in this subcontract is fully completed and performed in accordance with the contract documents and is satisfactory to the architect.

The back of the subcontract provides the following two paragraphs which relate only to monthly estimates, interim payments and release forms:

> (2) Failure to comply with any of the conditions of this agreement constitutes cause for withholding payments until such time as this condition is corrected to the satisfaction of the contractor.

(3) The subcontractor agrees to make good without the cost to the owner or contractor any and all defects due to faulty workmanship and/or materials which may appear within the period so established in the contract and if no such period is stipulated in the contract documents then such guaranty shall be for a period of one year from the date of completion of the contract.

(4) In the event it appears to the contractor that the labor and materials or other bills incurred in the performance of the work are not being currently paid, the contractor may take such steps as it deems necessary to assure absolutely that the money paid with any progress payment will be utilized to the fullest extent necessary to pay labor, materials and other bills incurred in the performance of the contract of the subcontractor. The contractor may deduct from any amounts due or to become due to the subcontractor, any sums or sums owing by the subcontractor to the contractor; and in the event of any breach of this subcontract of any of the provisions or obligations of this subcontract or in the event of the assertion by other parties of any claim or lien against the contractor or contractor's surety or the premises arising out of the contractor's performance of this contract, the contractor shall have the right, but is not required, to retain out of any payments due or to become due to the subcontractor, an amount sufficient to completely protect the contractor from any and all loss, damage or expense therefrom, until the situation has been remedied or adjusted by the subcontractor to the satisfaction of contractor. These provisions shall be applicable even though the subcontractor has posted a full payment and performance bond.

With regard to indemnity, the subcontract states:

(5) The subcontractor shall indemnify the contractor and owner and save him harmless from any and all loss, damage, costs, expenses and attorney's fees incurred on account of any breach of the aforesaid obligation or covenants and any other provision or covenant of the subcontract.

(6) Subcontractor shall indemnify, save harmless and defend the owner and contractor from and against any and all loss, damage, injury, liability and

> claims thereof for injuries to or death of persons, and all loss of or damage to property, resulting directly or indirectly from subcontractors performance of this contract, regardless of the negligence of owner or contractor or their agents or employees except where such loss, damage, injury, liability or claims are the result of active negligence on the part of owner [Thiokol] or contractor, or its agents or employees and is not caused or contributed to by an omission to perform some duty also imposed on subcontractor, its agents or employees.

With regard to attorney's fees, paragraph 3 of the contract provides:

> (7) The subcontractor assumes towards the contractor all obligations and responsibilities that the contractor assumes towards the owner. The subcontractor shall indemnify the contractor and the owner against and save them harmless from any and all loss, damage, expense, costs and attorney's fees suffered on account of any breach of the provisions or covenants of this contract.[1]

On or about the 28th day of February, 1989, by purchase order, Palmers contracted with Fiberglass to provide three 20' x 15' storage tanks. (Exhibit No. 2) Finding & Fact No. 9.

During the course of construction, one of the tanks manufactured by Fiberglass, failed during a fill test. (Findings of Fact No. 10).

After the failure, Thiokol undertook a direct contractual relationship with Fiberglass, commencing direct negotiations in the engineering, supervision, and modification of the existing tanks and the replacement of the failed tank. Also, Thiokol required a three year warranty directly from Fiberglass as a

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[1]Emphasis ours.

condition for acceptance. The tanks were thereafter tested and accepted by Thiokol. (Findings of Fact 11 and 12).

On May 2, 1989, Thiokol inspected the treatment plant and notified Interwest that it considered the treatment plant to be "substantially complete" as of that date and accepted the work of Interwest and its subcontractors and suppliers (Exhibit 45). A letter from Thiokol at that time commended the contractors and subcontractors for their completion of the project. (Exhibit 38). On June 18, 1989, the project was finally accepted by Thiokol. (Exhibit 138). Finding No. 16. The plant was placed in operation by Thiokol at that time with a "gentlemen's agreement" that if any small items were found, they could be completed after June. (Gladys Depo. pg. 131-137).

The final payment was due from Interwest to Palmers on completion, that is, on June 18, 1989. Finding No. 16. Interwest failed to pay Palmers.

Sometime after June 18, 1989, Thiokol, without knowledge or consent of Interwest, Palmers or Fiberglass, modified the waste storage tanks from a gravity fill mode as designed and specified to a pressure fill system. Finding 17. The pressure fill system lacked an automatic shutoff device or bypasses to prevent overfilling the tanks by the high volume pumps installed by Thiokol.

In the latter part of August, months after completion and acceptance of the work, one of the tanks failed while being

filled from the high volume pumps installed by Thiokol. Findings No. 23, 27.

At the time of failure, Interwest had still not paid Palmers the #93,000.00 owed to them. Also, even though the work had been accepted for months Thiokol had not paid Interwest the $200,000 owed to them. Thiokol claimed a set off.

The modifications to the tank were discovered by Palmers and agents of Interwest and Fiberglass during an inspection of the failed tank. Palmers, Fiberglass and Interwest each denied liability for the rupture of the tank citing the modifications by Thiokol.

At the trial of the matter, Palmers claimed that they did not breach their agreement, did not cause defects, and that the modifications by Thiokol voided the warranty, indemnity and guarantee provisions of their agreements. Palmers conducted the vast majority of the discovery and produced all of the expert witnesses for the contractor and subcontractors. Palmers took the lead in cross-examining the lay and expert witnesses of Thiokol.

The Trial Court stated in a memorandum decision (Records 1639-1648) as follows:

> The reason for the failure (of T33) has not been demonstrated to this court's satisfaction to be a result of noncompliance by the defendants with the terms and provisions of the contract.

P. 5.

> The overhead filling method did, however, allow for overfilling of the tank which the Court finds was the

most likely cause of the failure, and such overfilling would not have occurred had the gravity feed system remained in place.

In that connection testimony persuasive to this Court was that the most likely cause of the failure was the overfilling of the tank causing uplift which the tank was not designed to withstand.

The Court is unconvinced from the testimony of the technicians from Thiokol that overfilling did not occur. In order to believe that the overfilling did not occur, this Court would have to believe that the pumps were turned off just minutes before the rupture occurred.

The testimony with respect to the same was unconvincing and in this court's mind incredible. Most likely the facts were that the tank was overfilled and had been overfilling for some time prior to its discovery, causing an uplift, rupturing the bottom of the tank which went up the side of the tank causing the entire failure.

This Court confirmed there was no breach of contract by Palmers. See, e.g. Interwest Const. v. Palmer, 886 P.2d 92 at 96, 97, 100, 101 (Utah App. 1994). The Supreme Court also affirmed the decision of the trial court that there was no breach of the contract by Palmers. See Interwest Const. v. Palmer, 923 P.2d 1350 at 1357-58 (Utah 1996).

SUMMARY OF THE ARGUMENT

A. Interwest breached its subcontract agreement with Palmers (1) by failing to pay Palmers the balance due under the subcontract upon the work being completed, and accepted by the owner, which occurred on June 18th, some two months prior to the rupture of the tank in August after modifications were made by Thiokol; (2) by suing Palmers claiming a cause of action in indemnity, and (3) by suing Palmer for breach, where there was in

fact no valid claim. These breaches subjected Interwest to a claim for attorneys fees under the subcontractor. Palmers, was entitled to its fees to the same extent Interwest would have been entitled, had their claims been meritorious.

B. Utah Code Ann. § 78-22-56.5 provides for reciprocal rights to recover attorney's fees in contracts containing unilateral rights to attorneys fees. By reason thereof Palmers is entitled to recover costs and attorney's fees in defending an action instituted by Interwest, where Palmers demonstrated no claimed breach of contract or defects in construction.

C. Palmers' obligations to indemnify extended only to breach of contract in performance of the agreement between Interwest and Palmers. The agreement specifically excepts indemnification for losses, damages or injuries resulting from the active negligence on the part of owner, Thiokol, if not caused or contributed to by an omission on the part of the subcontractor. (Contract (6)). In short, Palmers' obligation to indemnify extends only to its work and does not include modifications by Thiokol which were unknown to Palmers and not contemplated by the agreement, and which caused the tank failure at issue.

D. Interwest is not entitled to recover its attorney's fees in allegedly enforcing the subcontract because there was no breach of the subcontract by Palmers.

E. Interwest is obligated to pay all of Palmers attorneys fees awarded by the trial court, whether paid directly by Palmer

or by a collateral source insurance carrier for which Palmers paid a premium to obtain insurance for such collateral coverage.

ARGUMENT

POINT I

INTERWEST IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES DUE TO PALMER'S BREACH OF THE SUBCONTRACT, BECAUSE THERE WAS NO BREACH.

The lower court properly found that the tank failed because of modifications to the tanks by Thiokol. Interwest now, somehow takes the position that there was a breach of the subcontract by Palmers, which assertion is clearly contrary to the evidence; to the Findings of Fact, Conclusions of Law and Decree; to the holdings on appeal by both this Court and the Utah Supreme Court. Interwest Const. v. Palmers, 886 P.2d at 96, 97, 100, 101 (Utah App. 1994); Interwest Const. v. Palmers, 923 P.2d at 1357-58 (Utah 1996).

The above mentioned decisions by this Court and the Utah Supreme Court are law of the case and dispositive. Interwest cannot now attack the lower court's Findings and Conclusions.

Even if Interwest wants to challenge the Findings of Fact in the face of the appellate decisions, it would have to marshal all of the evidence supporting the Findings and then demonstrate that the evidence is legal insufficient to support the finding. Reid v. Mutual of Omaha Insurance Company, below. Interwest has failed to do so. To attack the Findings of the lower court, Interwest would also have to show that the trial court was

clearly erroneous in making the finding that there was no breach of contract by Palmers in the construction of the tanks.

In order to determine whether there was a breach of contract, the court must first look to the four corners of the contract to determine the intention of the parties. Ron case Roofing & Asphalt v. Blomquist, supra. In interpreting a contract of indemnity Utah Courts now apply the rule of contract construction. Pickover v. Smith's Management Company, 771 P.2d 664 (Utah App. 1989).

Interwest cites the paragraph in Attachment "A" to the subcontract as granting them relief. The paragraph states:

> The subcontractor agrees to make good without cost to the owner any and all defects due to faulty workmanship and/or materials which may appear within the period so established in the contract documents.

That paragraph is not helpful to Interwest. First, there were no "defects due to faulty workmanship or materials," but due to the owner's, Thiokol's fault after acceptance of the work. Second, this paragraph refers to defects due to faulty workmanship and materials during the course of construction, prior to completion and acceptance, as a predicate to receiving periodic payments. The dispute in this case was due to lack of final payment repaired by the subcontract after acceptance by Thiokol. Interwest has tried to apply subparagraph 3 of the subcontract to a series of events not contemplated within the scope of the subcontract. See paragraph 1 for "scope of work."

Interwest also asked the lower court to require Palmers to indemnify Interwest against "claims" under the following language found in paragraph 3, "Prosecution of the Work, Delays," etc.:

> Subcontractor assumes toward the contractor all obligations and responsibilities that the contractor assumes toward the owner. The subcontractor shall indemnify the contractor and the owner against, and save him harmless from, any and all loss, damage, expenses, costs, and attorney's fees incurred or suffered on account of any breach of the provisions or covenants of this contract.[2]

This paragraph also affords Interwest no relief. First, nowhere is the word "claim" used in the paragraph. The paragraph simply does not apply. Second, the Trial Court dismissed all "claims" by Interwest against Palmers, and by Thiokol against Interwest, Palmers, and Fiberglass for any breach of contract, breach of warranties or negligence. The evidence was, the lower court found, and it was affirmed on appeals, that there was no breach by Palmers of the provisions or covenants of the subcontract. Interwest suffered no loss or damage or expense under the contract. There being no breach of the contract there was no call for indemnity.

Thiokol sought indemnity from Interwest upon Thiokol's contract with Interwest knowing full well that Thiokol had made substantial modifications to the tanks without notice to Interwest or Palmers thus voiding warranty or indemnity claims. Thiokol's claims were without merit ab initio.

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[2]Emphasis ours.

Interwest claimed at the bottom of page 20 of their brief that "it is undisputed that the tank was within the scope of work provided for in the subcontract with Palmers." While the original tanks may have been, the lower court found the tanks to be subject to a second contract between only Thiokol and Fiberglass, a contract to strengthen and alter the tanks.

Palmers' obligation of indemnity extends only to the scope of work as found in the contract, plans and specifications and general conditions and does not include separate agreements made by Thiokol with Fiberglass, nor modifications by Thiokol, nor even work within the contract where there is no breach or defects. Findings, paragraphs 23, 25; Conclusions of Law, paragraphs 4 and 5.

Assuming, arguendo, that there is in fact a right of indemnification, Interwest is entitled only to those costs and expenses involved in defense of the claim by Thiokol. See Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah App. 1988) where the Court said:

> However, the right to recover attorney's fees and other litigation expenses remains limited. The indemnitee can only recover those sums incurred in the primary products liability action, i.e., the defense of the claim indemnified against; the indemnitee is not entitled to those fees incurred in establishing the right to indemnity.

Interwest is not entitled to attorney's fees incurred in its failed attempt to prove its claim of indemnity that Palmers breached the subcontract so Palmers is liable.

Interwest has failed to make a distinction between attorney's fees in defending the claim and attorney's fees incurred in establishing the right to indemnity. Interwest's claim, if any, must exclude those fees incurred in failing to establish the right to indemnity.

Interwest citing paragraph 6 of the Subcontract Agreement reiterates that indemnity is called for in the event of breach of Palmers' obligation or "performance of the contract" regardless of the negligence of contractor or owner except where the loss of damage is the result of active negligence of owner or contractor and subcontractor did not constitute to the loss.

The Trial Court findings show a loss to Thiokol occasioned by Thiokol's, the owner's, modifications. No loss is shown by any act of Palmers or Interwest. Interwest claimed a loss and sought indemnity from Palmers, ultimately however, the court found no loss or damage and therefore Interwest's indemnity claim did not exist, Palmers however responded to Interwest's demand, and unnecessarily incurred attorneys fees for which Interwest is liable.

Clearly what Interwest seeks is indemnity regardless of contract rights and for acts not even contemplated by the parties. See Goldman v. Ecco-Phoenix Electric Corporation, 396 P.2d 377 (Ca. 1964); Tyee Construction Co. v. Pacific Northwest Bell Telephone Company, 472 P.2d 411 (Wash. App. 1970), wherein the Washington Court held:

It is inconceivable that respondent would assume all risks incident to the performance of the contract, including damage sustained to property of appellant caused by the un-workability of appellant's own plans and orders. If appellant had wished respondent to assume the responsibility for its mistakes, present or future, the undertaking could easily have been expressed the contract which it drew.

POINT II

INTERWEST BREACHED THE SUBCONTRACT, WHICH IT DRAFTED, AND WAS NOT JUSTIFIED IN WITHHOLDING PAYMENTS TO PALMERS.

The contract at issue was drafted by Interwest. On review of a Trial Court's interpretation of a contract, if unambiguous, its interpretation is a question of law. Taylor v. Hansen, 958 P.2d 923 (Utah App. 1998); Interwest Const. v. Palmer, 923 P.2d 1350, 1358-59 (Utah 1996); Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah App. 1989).

The agreement between Interwest and Palmers is not ambiguous in expressing the parties' agreement regarding the distinction between final payment and periodic payments.

Palmers claims, and the Trial Court found that Interwest had breached the subcontract agreement by not making final payment to Palmers upon completion and acceptance.

The criteria established by the subcontract agreement for final payment is at the bottom of the first page as follows:

(1) Final payment shall be due when the work described in this subcontract is fully completed and performed in accordance with the contract documents and is satisfactory to the architect.[3]

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[3]Emphasis ours.

Thiokol acknowledged substantial completion on May 2nd and announced full completion and took possession of the property on June 18, 1988. On June 18th the contract was completed and performed in accordance with the contract documents. The paragraph contains no prerequisite for payment by Thiokol to Interwest before Interwest pay Palmers. Upon completion Interwest must pay Palmers and failed to do so.

Interwest asserts contract provisions relating to interim payment, not final payment, as excuse for its refusal to pay Palmers. Page 2 of the agreement referred to as Attachment "A," "payments (con'd)" is a continuation of the payment provisions. The first paragraph of Attachment "D" relates to the subcontractor failing to submit interim monthly estimates. The second paragraph relates to the subcontractor completing monthly lien releases and supplier affidavit forms. The third paragraph contains the following language concerning interim payments:

> Failure to comply with any of the conditions of this agreement constituting cause for withholding payments until such time as a condition is corrected[4] to the satisfaction of contractor.

The conditions to be corrected are the conditions set forth in Appendix "D" paragraphs 1 and 2 relating to liens and releases. Such conditions have no relevance to final payment upon acceptance of the project. Also, Palmers had completed all lien releases. There is no condition established for final payment

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[4]Emphasis ours.

other than as set forth on page 1 of the subcontract agreement, quoted above at page 13.

Paragraph 4 of Appendix "D" is an agreement to make good, defects in faulty workmanship and materials. Paragraph 5 is a paragraph relating to payment of labor and material bills by the contractor in the event the subcontractor fails to meet its ongoing obligations during construction. These paragraphs also relate to the performance prior to, but not after completion.

Citation of these sections as authority for Interwest's conduct in withholding payment is erroneous and is out of context with the paragraphs from which they are taken.

Interwest would have this Court read bits and pieces of the subcontract out of context to support their contention that Interwest was entitled to withhold final payment to Palmers pending payment by Thiokol. If Interwest intended to condition its final payment to a subcontractor upon final payment by the owner then it should have stated that fact in paragraph (1), which Interwest drafted. Such an inclusion would have been simple; the paragraph would read as follows:

> Final payment shall be due when the work described in this contract is fully completed and performed in accordance with the contract documents and satisfactory to the architect [and upon final payment by the owner].

(Emphasized words added).

Interwest now asks this Court to rewrite the contract by interpreting provisions relating to the periodic payments as being applicable to final payment.

Failure to marshal evidence. The Trial Court found that Interwest breached the agreement by failing to pay Palmers upon completion of the contract. (Finding of Fact No. 30). To mount a successful challenge to the correctness of a Trial Court's Findings of Fact an appellant must first marshal all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the finding. Allen v. Brown, 893 P.2d 1087, 1090 (Utah App. 1995) citing Interwest Const. v. Palmer, 923 P.2d 1350, 1358 (Utah 1996); Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896 (Utah 1989). Interwest has failed to marshal the evidence and failed to demonstrate that the evidence is legally insufficient to support the finding. Having failed to successfully challenge the court's finding the clear import of the final payment provision is clear.

The clear contract language, read as a whole, establishes that final payment is due upon completion and acceptance of the contract.

POINT III

PALMERS IS NOT RESTRICTED TO RECOVERING ONLY THE FEES NECESSARY TO ENFORCE THE SUBCONTRACT ASSUMING INTERWEST BREACHED THE CONTRACT.

Interwest fails to perceive the real issue in this case. It is simply stated: If a party sues claiming indemnity and the Court finds no cause of action or claim against the indemnitor, the indemnitor is entitled to attorneys fees to the same extent as the indemnitee/contractor would have been entitled had it prevailed. This statement assumes there is an attorneys fee

provision in the agreement between the parties, which there is in this case. See paragraph 6.

Interwest claims that notwithstanding the determinations by trial and appellate courts that 1) Interwest has breached its contract and 2) Palmers did not breach the contract, Palmers is only entitled to those fees attributable to their counterclaim for payment of the balance due under the contract, not for establishing lack of breach and lack of construction defects. However, establishing lack of defects in construction was necessary to defend against Interwest's indemnity claim and obtain a judgment for payments due.

Interwest cites Trayner v. Cushing, 688 P.2d 856 at pg. 858 (Utah 1984). However, see R&R Energies v. Mother Earth Ind., 936 P.2d 1068 (Utah 1997); Equitable Life and Cas. Co. v. Ross, 849 P.2d 1187 (Utah App. 1993) (hereafter "Ross"). The key language in the Ross is "pursuing its claim for breach of contract and defending Ross' claim for recission, it is clearly entitled to an award of attorneys fees." Equitable v. Ross, at 1194. Utah Farm Products Credit Association v. Cox, 627 P.2d 62 (Utah 1981) the Court held: "that a party is therefore entitled only to those fees resulting from its principle cause of action for which there is a contractual obligation for attorney's fees." Interwest's principle cause of action is indemnity.

This case is particularly unusual[5] in that Interwest didn't sue Thiokol for the amount due and owing under the contract nor did Thiokol institute the action for breach of warranty, negligence or breach of contract as a result of the failure of the tank. This action was commenced by Interwest suing Palmers after the tank failed, after negotiations to determine fault failed, and after Thiokol announced that it would apply the balance due on the Interwest Contract to refitting the tanks. Interwest brought this suit against Palmers seeking indemnity. See Complaint. Record pg. 001-009. The first cause of action claims breach of express warranty. The second cause of action asserts a claim for indemnity. The third cause of action states a claim in implied warranty and the fourth cause of action is a negligence claim. Palmers is entitled to its attorneys fees for establishing that Interwest was wrong in its claims.

Palmers, in its counterclaim against Interwest, record pg. 011-022, alleged a cause of action claiming the unpaid balance due under the contract of $93,000. Palmers is also entitled to its attorneys fees for establishing that Interwest breached the subcontract by failing to pay.

By filing a claim against the subcontractor for indemnification as distinguished from suing Thiokol on a debt or an obligation, Interwest demanded indemnity. Indemnity, because of the nature of the action, encompasses contracts, negligence,

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[5]As noted by this Court in Interwest Const. v. A.H. Palmer, 886 P.2d 92 (Ut. App. 1994) at page 95.

and warranty. All of the surrounding claims by all of the parties create the indemnity claims which were defended successfully by Palmers. See Affidavits for attorney's fees by Palmers' attorneys. Record pages 1731-1734; 1754-1775; 1940-1948.

POINT IV

IN ADDITION TO FEES INCURRED AT THE TRIAL, PALMERS IS ENTITLED TO ATTORNEY'S FEES INCURRED IN THIS APPEAL FOR SEVERAL REASONS.

(1) The appeal by Interwest deals with the vindication of contract rights. Interwest demands indemnification while claiming to be entitled to withhold payment. Interwest doesn't challenge the findings of fact that it breached the contract but claims it was entitled to withhold final payment under the contract terms. In making this contention Interwest fails to cite and reconcile in its Brief the provision for final payment. The clear import of the final payment provision is that final payment was due upon completion of the contract. It was not conditioned upon Interwest's receipt of final payment from Thiokol.

(2) Interwest benefitted greatly by the defense of this case by Palmers. No breach of contract by Palmers or Interwest has been shown. Palmers certainly prevailed against Interwest and Thiokol on their claims of breach. Palmers certainly prevailed against Interwest on its counterclaim for final payment. U.C.A. § 78-27-56.5 (1986), allows courts, one of which is the Court of

Appeals, to grant fees to the prevailing party. R&R Energies v. Mother Earth Indus., infra.

CONCLUSION

The lower court's award of attorneys fees to Palmers should be affirmed, and attorney's fees awarded to Palmers related to this appeal.

ORAL ARGUMENT REQUEST

Oral argument is requested because facts and prior proceedings are complex and may need clarification orally.

DATED this 2nd day of February, 1999.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this 11th day of February, 1999 to the following:

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